

**DOCKET NO.: ALLE0032-104  
(17328 CON5)**

**PATENT**

**REMARKS**

Upon entry of the above amendment, claims 31-38 will be pending in this application.

**I. Terminal Disclaimer**

Claims 31-38 are rejected under the judicially created doctrine of obviousness-type double patenting over claims 4-5 of U.S. Patent No. 6,869,610 (hereinafter "the 610 patent"), claims 1, 3, 5 and 7-12 of U.S. Patent No. 6,464,986 (hereinafter "the 986 patent") and claims 1, 4, 5, 9, 12, 13 and 28-32 of U.S. Patent Application No. 10/630,206 (hereinafter "the 206 application").

Applicant hereby submits three terminal disclaimers under 37 C.F.R. 1.1321(c) with respect to the 610 patent, the 986 patent and the 206 application for the relevant claims of the present application. Thus, the obviousness-type double patenting rejections should be withdrawn.

Further, Applicant asserts that the terminal disclaimers are submitted for the sole purpose of administrative efficiency, and Applicant respectfully disagrees that the pending claims are obvious over the 610 patent, the 986 patent and the 206 application. (The filing of a terminal disclaimer to obviate a rejection based on nonstatutory double patenting is not an admission of the propriety of the rejection. *Quad Environmental Technologies Corp. v. Union Sanitary District*, 946 F.2d 870, 20 USPQ2d 1392 (Fed. Cir. 1991), MPEP §804.02 II).

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**II. The Claims Are Novel**

**A. An Incisional Wound Pain Is Different From a Myofascial Pain.**

Claims 31-38 are rejected under 35 U.S.C. 102(b) for allegedly being anticipated by Borodic et al. (WO94/15629, hereinafter “the Borodic reference”). Respectfully, the Borodic reference does not teach the claimed invention, because it does not disclose all the features of the present invention. For example, a feature of the present invention is the treatment of *incisional wound* pain. The Borodic reference does not teach or suggest the treatment of incisional wound pain. Instead, the Borodic reference teaches the treatment of a myofascial pain. An incisional wound pain is different from a myofascial pain. For example, an incisional wound pain is due to a surgical incision. The Specification, at page 23, lines 13-20. On the other hand, a myofascial pain is due to “unusual tension, tone and *afferent receptors* within muscle which carry the impulse perception of pain.” The Borodic reference, at page 2, line 33 to page 3, line 1. Since a myofascial pain is not an incisional wound pain, and the Borodic reference does not teach or suggest a method of treating an incisional wound pain, the claimed invention is novel over the Borodic reference.

**B. A Postoperative Incisional Wound Pain Is Different From a Postoperative Pain Attributed to Muscle Spasm Associated With Cerebral Palsy.**

Claims 31-38 are rejected under 35 U.S.C. 102(a) for allegedly being anticipated by Barwood et al. (Developmental Medicine & Child Neurology 2000, 42:116-121, hereinafter “the Barwood reference”). Respectfully, the Barwood reference does not teach the claimed invention, because it does not disclose all the features of the present invention. For example, as mentioned above, a feature of the present invention is the treatment of postoperative *incisional wound* pain. The Barwood reference does not teach or suggest the treatment of incisional wound pain. Instead, the Barwood reference teaches the treatment of a postoperative pain attributed to muscle spasms associated with

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cerebral palsy. A postoperative incisional wound pain is different from a postoperative pain attributed to muscle spasms associated with cerebral palsy. For example, the present specification explains that an incisional wound pain is due to a surgical incision. The Specification, at page 23, lines 13-20. On the other hand, the postoperative pain referenced by the Barwood reference is due to muscle spasms associated with cerebral palsy. The Barwood reference, abstract. The Barwood reference also teaches that postoperative incisional wound pain is different from postoperative pain attributed to muscle spasms associated with cerebral palsy. For example, the Barwood reference discloses that

In children with CP, it is unlikely that incisional pain alone is responsible for the postoperative course experience by many, and it is considered that muscle spasm play a major role.

The Barwood reference, page 116, second column. Clearly, the Barwood reference is differentiating between a postoperative incisional wound pain and a postoperative pain attributed to muscle spasms associated with cerebral palsy. (Note that pending claim 36 also expressly states that the postoperative incisional wound pain is not associated with a muscle disorder, e.g., muscle spasm).

Since a postoperative pain attributed to muscle spasms associated with cerebral palsy is not an incisional wound pain, and the Barwood reference does not disclose a method of treating an incisional wound pain, the claimed invention is novel over the Barwood reference.

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In view of the foregoing, Applicant submits that the pending claims are in condition for allowance, and an early Office Action to that effect is earnestly solicited.

Respectfully submitted,

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